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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

POLK COUNTY, ET AL., *Petitioners,*

v.

RUSSELL RICHARD DODSON, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE

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INTEREST OF AMICI

(1) The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

(2) NLADA joins petitioner in seeking reversal of the judgment of the United States Court of Appeals for the Eighth Circuit, recognizing the possibility that its position will expose a public defender (here, either Petitioner Shepard or the Polk County Offender Advocate) to potential liability for violation of Respondent's civil

rights under 42 U.S.C. Sec. 1983. NLADA has a keen interest in advancing the professionalism of all public defenders, and the Association feels this Court will be aided by the position of the only national group which speaks for public defenders.*

(3) NLADA also has an interest in protecting the rights of indigent clients and in insuring that they are denied no rights on the basis of their wealth and submits this brief in support of indigent clients' equal access to the civil courts.

(4) The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 2,000 lawyers who are citizens of every State, and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors, and judges of the state and federal courts.

(5) Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

The purposes of the Association, as set out in its bylaws, are:

(a) To promote study and research in the field of criminal defense law and the related arts;

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*As part of its services to members, NLADA offers professional liability insurance to public defenders. The association receives no monetary benefit from the insurer as a result of the purchase of coverage by members of the Association.

(b) To disseminate by lecture, seminars and publications the advancement of the knowledge of the law as it relates directly and ancillary to the field of criminal defense practice;

(c) To promote the proper administration of criminal justice;

(d) To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases;

(e) To foster periodic meetings of defense lawyers and to provide a forum for the material exchange of information regarding the administration of criminal justice and thereby concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedures.

(6) Amici argue only the question of whether public defenders act under color of state law, for purposes of 42 U.S.C. Sec. 1983. Amici take no position on the issue of immunity.

(7) The National Legal Aid and Defender Association has received the written consent of both parties for the filing of this brief. The National Association of Criminal Defense Lawyers has received the written consent of both parties for the filing of this brief.

ARGUMENT

A FUNCTIONAL TEST SHOULD BE APPLIED TO DETERMINE WHETHER OR NOT THE ACTS OF A PUBLIC DEFENDER ARE PERFORMED UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. SEC. 1983.

In *Ferri* v. *Ackerman,* 444 U.S. 193 (1979), this Court recognized that the responsibilities of an attorney appointed to represent an indigent defendant in federal court differ radically from those of the judge, the pros-

ecutor and the grand jury. Conversely, the court recognized the strong parallels between "the primary office" of appointed counsel and that of privately retained counsel in criminal cases. *Ferri* v. *Ackerman, supra,* 444 U.S. at 202-204. Again last term, this Court refused to make distinctions between privately retained counsel and appointed counsel, in the context of a Sixth Amendment denial of effective assistance due to an alleged conflict of interest. *Cuyler* v. *Sullivan,* 446 U.S. 335, 344-345 (1980). In the case at bar, this Court is again called on to recognize the fundamental similarities between appointed and retained counsel in representation of their clients in criminal cases.

In seeking relief under 42 U.S. Sec. 1983, the threshold question is two-pronged: (1) whether plaintiff has been deprived of a right protected by the Constitution, and (2) whether the deprivation occurred "under color of state law."[1] In deciding whether action has taken place under color of state law, this Court has implicitly looked to the position or role played by the person alleged to have committed the wrong. See, e.g., *Imbler* v. *Pachtman,* 424 U.S. 409, (1976) (prosecutors); *Butz* v. *Economou,* 438 U.S. 478, (1978) (federal officers); *Pierson* v. *Ray,* 386

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[1] The first element of this test is not in question in this case, but should be subjected to close scrutiny on remand, since the only allegation made by respondent is a claim of denial of various constitutional rights due to the filing of a motion to withdraw as counsel on grounds that the appeal was frivilous, pursuant to this Court's decision in *Anders* v. *California,* 368 U.S. 738 (1967). Without amendment of the pleadings, or the willingness by this Court to again examine the procedures approved in *Anders,* the allegation of malfeasance in the filing of a motion to withdraw is insufficient to state a cause of action, since such action is putatively taken in *fulfillment,* not derogation, of the right to adequate assistance of appellate counsel under the Sixth Amendment.

U.S. 547 (1967) (judges). This analysis is not appropriate for the public defender, and Amici urge this Court instead to adopt a functional test, under which the actions, or functions, of the public defender, rather than the role or position occupied, would determine whether the jurisdiction of the court can be invoked because the wrongdoing occurred "under color of state law." If the actions are taken pursuant to representation of an individual client, that lawyer should stand in no different position before the law than the court-appointed or privately retained attorney. No state action has occurred. However, if the actions of the attorney are taken pursuant to policies or practices of the office itself, or a governmental administrative or funding source, action under color of state law has occurred.

There are several reasons why this test must be used, both theoretically and practically. First and foremost, the public defender is unique in his or her relationship to government. A public defender "office" may be a governmentally funded unit, a private not-for-profit corporation, or a private law firm, among other hybrid formulations. In fact, the term "public defender" has no universal meaning, and its use to describe a person performing "under color of state law" is inherently ambiguous. Whatever the specific structure, however, a "public defender" is established by a state or local government to conform to the constitutional mandate for counsel in criminal cases. However, once appointed to represent an individual client, that public defender's client loyalty may, and sometimes must, be antagonistic to the public's interest. American Bar Association, *Standards for Criminal Justice, The Defense Function.* Stan. 4-3.9; *Providing Defense Services,* Stan. 5-1.3 (2d Ed. 1980). In order to perform work for the individual, the public defender must therefore be free from all governmental restraint or

interference. This is so whether or not there is a structure for administration and funding of that attorney's representation, and regardless of the source of that administration or funding. Thus, in deciding whether the public defender has performed "under color of state law," the purpose for which the activity is performed must be examined.

Second, the purpose of 42 U.S.C. Sec. 1983 is to protect against unjust interference by the *government* in the exercise of constitutional rights. It is therefore not entirely accurate to determine whether there is state action by focusing on the position occupied by the person alleged to have engaged in unconstitutional conduct. The issue is the source of authority pursuant to which action was taken, contrary to a person's constitutionally protected rights. Gozansky and Kertz, *Private Lawyer's Liability Under 42 U.S.C. Sec. 1983,* 24 Emory L.J. 959, 970-972 (1975). *Monroe* v. *Pape,* 365 U.S. 167, 184 (1961). If the government is sufficiently involved in a violation of rights, the state action requirement of 1983 is satisfied. For the public defender, this means that there must be a clear distinction as to whether the source of the alleged wrong lies in the defender's acts as a governmental agent, or in actions as counsel, representing an individual client in the best exercise of professional judgment.

Third, the functional analysis is not unknown to the law, and has in fact been applied in highly analogous situations. The most relevant of these is the determination whether a private not-for-profit organization providing legal aid with public funds acts under color of state law within 42 U.S.C. 1983. There is a direct analogy between an entity providing indigent representation and an individual performing those same services. In *Lefcourt* v.

Legal Aid Society, 445 F.2d 1150, 1156-1157 (2d Cir. 1971) the court examined the question of whether the Society had wrongfully discharged an attorney employed there. The court's analysis did not proceed from the premise that it had to decide whether the Society always or never acted under color of state law, but whether the questioned employment practices of the Society were part of its public or private functions, recognizing that it performed both. The court concluded that these practices were essentially private, but implicitly could have found sufficient governmental involvement in the employment activities actions of the Society to justify a conclusion that state action had occurred. See also, *Graseck* v. *Marceri,* 582 F.2d 203 (2d Cir. 1978), cert. den. 439 U.S. 1129. A similar analysis can as easily be applied to the actions at issue in the case at bar.

The functional test for public defender liability is not merely useful; it is required for meaningful analysis.

A.

A Public Defender Does Not Act Under Color Of State Law When The Alleged Wrong Is Committed In The Course Of Individual Client Representation.

In the course of individual client representation, the public defender is no more acting under color of state law than is the privately retained or court-appointed lawyer, when that lawyer serves as an "officer of the court." In individual representation, public defenders are not only free of state control; they are obligated by rules of court and ethical considerations to treat their clients as though they were counsel receiving fees. *Moore* v. *United States,* 423 F.2d 730 (3d Cir. 1970).

In all respects, then, public defenders perform an essentially private function when representing their in-

dividual clients. That private function was recognized by this Court in *Ferri* v. *Ackerman,* where it was stated:

> Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.
>
> *Ferri* v. *Ackerman, supra,* 444 U.S. at 204.

If the public defender acts privately in individual representation, but is publicly employed, there can be state action only if "there is a sufficiently close nexus between the State and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974).

It is frequently asserted, as it was below in the Eighth Circuit, that the public defender is "empowered" by the state because the state selects, hires and fires, and may well limit the scope of services to be provided. Moreover, it is argued, the state is involved even in the selection of counsel, since counsel is chosen for the defendant. *Dodson* v. *Polk County,* No. 79-1996, 8th Cir., Aug. 26, 1980, Op. at 6-7. These assertions wrongly focus on the relationship between the government and counsel. Rather, the focus should be on the control exerted by the *client* — whether the client's relationship is primarily with the state or with counsel. This Court should continue the reasoning developed in *Ferri* v. *Ackerman* and *Cuyler* v. *Sullivan, supra,* and recognize the relationship as one of attorney-and-client, rather than government-and-client.

That public defenders *may* be hired and paid by the government is true;[2] to suggest that this means their first loyalty is to the government is totally inaccurate. This suggests that money alone supplies a sufficient nexus between the government and counsel to allow a finding of state action. In fact, clients pay fees to their retained counsel, and those fees are clearly related to the sanction which society gives to that relationship by requiring the extensive educational and licensing requirements of attorneys. Yet, for all the privileges bestowed by society, through court rules and legislation, upon retained counsel, no court has held that a private lawyer is engaged in state action under 42 U.S.C. Sec. 1983. Gozansky and Kertz, *Private Lawyer's Liability Under 42 U.S.C. Sec. 1983, supra.* In fact, court decisions have uniformly held that counsel engaged in private practice and appointed to criminal cases are not within the ambit of state action. *Slavin* v. *Curry,* 574 F.2d 1256, 1265 (5th Cir. 1978); *French* v. *Corrigan,* 432 F.2d 1211, 1214 (7th Cir. 1970); *Mulligan* v. *Schlachter,* 389 F.2d 231, 233 (6th Cir. 1968). Unless these decisions are wrong, any holding that public defenders, when engaged in individual client representation act under color of state law would leave

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[2] "Public Defenders" may include full-and part-time counsel paid from city, county, court and state funds, or some combination thereof; counsel performing in a government office, a law-school clinic, a not-for-profit corporation, or limited partnership; private counsel who perform pursuant to an open-bid or closed-bid contract; or private counsel who perform the work *pro bono* or through privately obtained funds. Cf. Benner and Lynch Neary, *The Other Face of Justice* (NLADA, 1973). Not even appointment to perform the work can be considered a common element, since some jurisdictions allow the defendant's involvement in the selection of counsel. See, e.g., Ohio R.C. 120.33 (A) and (B); but see *State ex rel. Butler* v. *Demis,* 66 Ohio St.2d 123 (1981).

public defenders on a qualitatively different standard than their private court-appointed and privately-retained counterparts. Such a distinction would set publicly funded counsel apart unnecessarily and would reinforce what is already a difficult hurdle for most public defenders; that of convincing their clients that the first loyalty of the lawyer is to the client, not the government. Without the trust of the client that comes with this knowledge, the attorney-client relationship is reduced to a mere formality.

No attorney, civil or criminal, who makes his or her livelihood representing clients would minimize the value of securing the client's trust to successful performance. Without this critical bond it is impossible to lead even the most sophisticated client on the course which is most in his or her interest. The difficulties of establishing such trust are of course magnified when the client is unsophisticated and his or her freedom and reputation are at stake. Where the attorney is a public defender or, to a lesser extent, when the lawyer is court-appointed private counsel, the problem of gaining the client's trust is magnified due to the institutional position of government-funded counsel. As every public defender knows from experience and as every study of client relations has demonstrated, indigent defendants have a fundamental mistrust of such attorneys because they perceive them as having a primary allegiance to the state or prosecution. See Casper, *Improving Defender-Client Relations,* 35 NLADA Briefcase 114, 126 (1977); O'Brien, Peterson, Wright & Hostica, *The Criminal Lawyer: The Defendant's Perspective,* 5 Am. J. Crim. L. 275, 292, 308 (1977); Booknote, 50 Denver L.J. 47, 83 (1973); Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. 91st Cong., 1st Sess, 305 (1969). The result of this perception and mistrust all too

often is misguided self-help on the part of indigent clients and such disregarding of counsel's sound advice as to essentially lessen counsel's ability to provide effective representation. This crisis of confidence had adverse effects on the court system as well as on the client, since distrust of the "state defense lawyer" is also manifested in defendants' meritless appeals and collateral petitions.

The only way to eliminate this critical obstacle to providing skillful, constitutional representation to the indigent defendant is to keep public defenders as close as possible to the institutional position of private counsel, in whom indigent defendants have the greatest faith.

Again, the fact that the client has little or no choice in selection of counsel should not bear on the issue of state action. The same is true for appointed counsel in private practice. Yet, as noted above, courts find no state action in this process. In fact, in *Cuyler* v. *Sullivan* this Court recognized the lack of client control even in the selection of *retained* counsel. *Cuyler* v. *Sullivan, supra,* 446 U.S. at 344-345. Moreover, this fact strongly implies that the public defender is a second-class citizen of the profession, and clearly would not be chosen if the opportunity arose. While this may be true in some cases, the opposite is also true. The remedy is not to reinforce the distinctions, but to insure that public defenders have the resources necessary to conduct their defense.

In short, neither the source of remuneration nor the origin of the relationship should govern counsel's unfettered discretion in the exercise of professional skill and responsibility on behalf of the individual client.

B.

A Public Defender Does Act Under Color Of State Law When The Alleged Wrong Is Committed Pursuant To Policies Or Practices Of The Office Administration, A Supervisory Authority Or A Funding Source.

While the public defender does occupy a singularly private relationship with the individual client, the "office" of the public defender, because it receives governmental funds and exercises certain governmental powers, can affect that private relationship to such an extent as to rise to state action. In *Monroe* v. *Pape,* 365 U.S. 167, 184 (1961), this Court stated that "(m)isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state, is action taken 'under color of' state law."

It is frequently noted that public defender offices are perpetually underfunded, understaffed and overworked, and that the defendant is justifiably skeptical of adequate representation under such circumstances. See Harris, *Annals of Law — In Criminal Court,* New Yorker, April 14, 1973, at 45-88, April 21, 1973, at 44-87; Silberman, *Criminal Violence, Criminal Justice,* pp. 304-305 (Random House 1978); *Washington Post,* "The Cost of Defending Indigents: A Nationwide Problem", May 27, 1981, p. A2.

Such criticism is, fortunately, often not true, but the client whose case is affected by these systemic shortcomings should have a remedy under 42 U.S.C. Sec. 1983. These are the very abuses by government to which the Civil Rights Acts are addressed. Moreover, allowing access to 1983 action under such circumstances draws a bright line between alleged indescretions by counsel which are part of individual representation, and those which emanate from the burden which the state places upon counsel to perform in an unconstitutional fashion.

It is no response to argue that public defenders will always work under such conditions, that they must inevitably make some decisions for the good of all clients, and that therefore they always act under color of state law. First, public defenders do not, *per se,* suffer from institutional shortcomings. Second, all attorneys must make choices as to how to allocate time and resources. This alone does not justify including or removing them from state action. However, when those choices are affected by office policies, statutory limitations or funding levels, the attorney's choice has clearly been made while cloaked in the mantle of state authority, and the client should have a remedy.

Restricting the remedies for those injured by overworked and inadequately supported defender staffs is hardly an acceptable response to the problem. In the context of the 1983 claim, it is a matter of proof to determine whether the actions of the defender were part of the strategy in providing effective representation, or were taken pursuant to policies or practices of the office, the supervisor or a governmental authority. The only acceptable response to the problem of overwork and inadequate support is for legislatures, and courts where necessary, to insure that public defenders be given the resources necessary to provide effective assistance of counsel to the poor, or to pay the price for failure to provide such resources.

A more insidious argument against state action has been that leaving public defenders open for suit will discourage competent attorneys from entering or remaining in this field. Cf. *Minns* v. *Paul,* 542 F.2d 889, 901 (4th Cir. 1976) cert. denied, 429 U.S. 1102. This argument unfairly impugns the dedication and abilities of those lawyers who, in obedience to the commands of the Con-

stitution and the standards of our profession, make their careers defending the poor in criminal cases. Moreover, it introduces the vice of implicitly accepting unconstitutional inadequacies in our system for providing representation of the poor. At the same time, it clearly reveals the danger that such protection will encourage incompetence rather than more effective representation. To the extent there is a problem with attracting or retaining skilled attorneys to represent the poor, the rational solution is to provide higher salaries and better working conditions. After all, it could not seriously be contended that the absence of state action discourages able attorneys from representing the rich. See also, *Ferri* v. *Ackerman, supra,* 444 U.S. at 200, fn. 17.

On the other hand, a holding that public defenders never act under color of state law is a virtual imprimatur for the office or the government to continue to abuse its authority in the administration or funding of public defender offices.

CONCLUSION

Respondent was unrepresented in the District Court. The pleadings in this case are inarticulate, at best, and demonstrate a strong showing for the need for an order appointing counsel. Without more, Amici argue that serious questions remain as to the liability of any or all of the Petitioners for actions taken pursuant to policies or practices which might have denied Mr. Dodson his constitutional rights.

Amici urge this Court to grant Mr. Dodson the relief he sought in the Eighth Circuit: remand to the District Court. There proceedings could be held consistent with a

conclusion that a functional test to determine state action by the public defender must be applied to the amended allegations of the pleadings.

Respectfully submitted,

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